Supreme Court, U.S.
FILED
AUG 18 2000
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No. 99-2064

IN THE

Supreme Court of the United States

BEATRICE A. ARMENDARIZ,

Petitioner,

v.

THE CITY AND COUNTY OF DENVER,
a municipal corporation, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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The City and County of Denver, the Office of Employee Assistance, Andrew Wallach, and Christopher Weimer hereby submit this Brief in Opposition to Beatrice A. Armendariz's Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case. Petitioner has not set forth compelling reasons to support the grant of her petition as required by the Supreme Court Rule 10. In fact, Petitioner makes no argument whatsoever that she has satisfied any of the reasons set forth in Supreme Court Rule 10.

STATEMENT OF THE CASE

A. Statement Of The Facts

Pursuant to Supreme Court Rules 15(3) and 24(2), the Respondents are dissatisfied with the Petitioner's statement of facts because it is incomplete and does not accurately reflect the record presented to the Tenth Circuit. Moreover, Petitioner fails to offer any record citations.

Petitioner commenced her employment with the City and County of Denver ("City") in 1983 as a social worker. Pet. 10th Cir. Apndx. I at 64 and 119-20.[1] She identifies herself as an "Hispanic, Indian, American female" who was born in Kansas City, Missouri. Pet. 10th Cir. Apndx. I at 64, 119-20 and 142. Her date of birth is January 16, 1951. In 1985, Petitioner laterally transferred to the City's newly formed Office of Employee Assistance ("OEA"), which provides counseling services to the City's employees and their families. Pet. 10th Cir. Apndx. I at 64 and 119-20. In early 1994, Petitioner was appointed Acting Director of the OEA and served in that position until March 1995. Pet. 10th Cir. Apndx. I at 64-65.

In late 1994, the City began the process of hiring a permanent Director of the OEA. Pet. 10th Cir. Apndx. I at 65. Petitioner applied and was selected for the position over several

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1. References to the appendix the Petitioner filed in the Tenth Circuit Court of Appeals will be in the form of "Pet. 10th Cir. Apndx. __."

other applicants, including Respondent Christopher Weimer. Pet. 10th Cir. Apndx. I at 65. Petitioner accepted the offer, to begin on March 2, 1995, and entered into salary negotiations. Petitioner voiced dissatisfaction with the salary being offered. Pet. 10th Cir. Apndx. I at 65-66 and 175. The City hired Petitioner according to the City's Career Service Authority practices for promoted individuals at a Step "A" through "C" pay range. Pet. 10th Cir. Apndx. I at 65-66 and 175. Upon becoming the Director in 1995, Petitioner received a pay increase of more than 16 percent (even though the City's rules provide for only a 9.6 percent increase when an employee is promoted) from $3,114/ month to $3,626/month. Pet. 10th Cir. Apndx. I at 65-66, 175 and 267.

The City has a personnel rule whereby employees who are promoted are placed on "promotional probation" for a period of six months. An employee can be returned from promotional probation at any time to her former position. Pet. 10th Cir. Apndx. I at 186.

During Petitioner's time as director, Respondent Wallach requested from Petitioner an outline of OEA staff duties. Pet. 10th Cir. Apndx. I at 67-68. Petitioner did not respond to the memorandum, claiming she had previously sent to him several memoranda covering the same matters. On July 11, 1995, Respondent Wallach issued another memorandum to Petitioner, criticizing her for, among other things, her repeated failure to provide an outline of staff duties, for her tardiness in providing budget paperwork, and for the "mess" regarding OEA sick leave records. Pet. 10th Cir. Apndx. I at 67-68. While Petitioner inherited disorganized sick leave records from the previous director, she also kept, during the time that she was the director, inadequate records to reconstruct some employees' leave statements. Pet. 10th Cir. Apndx. I at 68-70 and 143. At the time Petitioner was the director, there were also monies missing from the petty cash account. Pet. 10th Cir. Apndx. I at 70 and 143.

On July 14, 1995, Petitioner attended a meeting to discuss an oral complaint made against her that dealt with an alleged breach of confidentiality. Pet. 10th Cir. Apndx. I at 68. After the meeting concluded, Respondent Wallach and Petitioner met alone and Petitioner yelled at Respondent Wallach, accusing him of discriminating against her because she was Hispanic and Native-American. Pet. 10th Cir. Apndx. I at 68, 184-185, 193. In her deposition, Petitioner admitted that she was unprofessional in yelling at Respondent Wallach. Pet. 10th Cir. Apndx. I at 146.

Petitioner filed a grievance on July 25, 1995 regarding the allegations of breach of confidentiality, but her grievance did not allege discrimination. Pet. 10th Cir. Apndx. I at 70 and 147. That grievance was denied. Pet. 10th Cir. Apndx. I at 70. In August 1995, Respondent Wallach made a personnel decision to return Petitioner from promotional probation for the OEA Director position to her former position of social worker. Pet. 10th Cir. Apndx. I at 70-71 and 189.

After Petitioner complained about the return from promotional probation to Respondent Wallach in August 1995, he offered her a "probation within probation." Pet. 10th Cir. Apndx. I at 71 and 148. This would have been an opportunity for Petitioner to have closer and more supervision from Respondent Wallach to perform a very focussed set of tasks, to see if she could implement those tasks successfully as a second chance to succeed in the job. Petitioner, however, rejected the offer. Pet. 10th Cir. Apndx. I at 71 and 148. It also would have paid the same salary as the OEA Director position. Pet. 10th Cir. Apndx. I at 71. In fact, Petitioner testified in her deposition she could have kept her title of OEA Director had she accepted the "probation within probation" offer by Respondent Wallach. Pet. 10th Cir. Apndx. I at 71 and 148. Petitioner rejected the "probation within probation." Pet. 10th Cir. Apndx. I at 71 and 148.

Respondent Weimer, a white male, was appointed from another City job to Director of the OEA on August 21, 1995 at

a higher salary than that of Petitioner. Pet. 10th Cir. Apndx. I at 72-73 and 206-207. Respondent Weimer's date of birth is March 15, 1955. Pet. 10th Cir. Apndx. I at 206. Respondent Weimer is four years younger than Petitioner. Respondent Weimer's appointment to OEA Director was considered a "transfer," not a "promotion." Pet. 10th Cir. Apndx. I at 72-73 and 207. Consequently, he was not subject to the step "A" through "C" pay scale. Respondent Weimer continued to earn the same salary as he had earned previously. Pet. 10th Cir. Apndx. I at 73 and 190. Respondent Weimer became Petitioner's immediate supervisor. Pet. 10th Cir. Apndx. I at 73.

In response to Respondent Weimer's appointment as OEA Director, Petitioner filed a second grievance on August 30, 1995 alleging discrimination based on race, gender and age. The grievance was denied. Pet. 10th Cir. Apndx. I at 73. Petitioner appealed, and after a four day quasi-judicial hearing, the Hearing Officer found that no discrimination or retaliation had occurred. Pet. 10th Cir. Apndx. I at 73-74 and 276-302.

When Petitioner returned to her social worker position, she discovered that some of her former duties had been assigned to other employees. Pet. 10th Cir. Apndx. I at 74 and 207-208. At all times, however, Petitioner was allowed to perform the most essential job duties of a social worker's position. Pet. 10th Cir. Apndx. I at 74 and 207-208. On September 20, 1996, Respondent Weimer completed a performance evaluation for Petitioner and gave her a "meets expectations" rating. Pet. 10th Cir. Apndx. I at 75 and 208.

In March 1997, Petitioner had a motorcycle accident that required surgery on her knee. After Petitioner exhausted her sick leave, she requested and was granted Family Medical Leave from March 10 through June 2, 1997. On May 20, 1997, Petitioner requested additional leave beyond her FMLA entitlement and provided a note from her doctor. Pet. 10th Cir. Apndx. I at 75-76.

The City has a personnel rule allowing supervisors to investigate the alleged illness of an employee absent on sick

leave. The City also has a personnel rule stating that false or fraudulent use of sick leave shall be cause for disciplinary action and may result in dismissal. The City has a personnel rule allowing a supervisor to require the employee to provide a statement signed by an attending physician satisfactory to the supervisor. Pet. 10th Cir. Apndx. I at 75 and 303.

Petitioner was advised by Respondent Weimer more than once to have her doctor complete a "Physician Certification of Employee/Patient Absence" form to document what restrictions her doctor had imposed upon her that prevented her from performing her job duties. Pet. 10th Cir. Apndx. I at 76-79 and 20-211. However, Petitioner's doctor never properly completed the form to Respondent Weimer's satisfaction. Pet. 10th Cir. Apndx. I at 76-79. Petitioner never provided a medical explanation as to why she, whose position was primarily a sedentary one, could not perform the tasks that required little, if any, physical movement. Pet. 10th Cir. Apndx. I at 76-79. Indeed, Petitioner ultimately admitted in her deposition that her knee injury did not, in and of itself, prohibit her from performing her job duties as a social worker. Pet. 10th Cir. Apndx. I at 157.

On July 9, 1997, Petitioner was informed that she was responsible for assuring that her doctor properly complete and return the form by July 11. Pet. 10th Cir. Apndx. I at 78. Respondent Weimer did not receive the form; so on Friday, July 18, he told Petitioner to report to work the following Monday. Pet. 10th Cir. Apndx. I at 79 and 158. She did not report to work but called in sick. Pet. 10th Cir. Apndx. I at 79 and 158.

On August 1, 1997, Respondent Weimer conducted a pre-disciplinary meeting based upon Petitioner's approximately five weeks of unauthorized leave. Pet. 10th Cir. Apndx. I at 79-80 and 158. Petitioner appeared at the pre-disciplinary meeting without any crutches or other devices to assist with her alleged knee condition. Pet. 10th Cir. Apndx. I at 79-80 and 158. At the pre-disciplinary meeting, Petitioner never offered any explanation as to what about her knee condition prevented her

from performing her duties as a clinical social worker, including sitting at a desk, talking on the telephone, meeting with clients and preparing paperwork, for the approximately five weeks that she took unauthorized leave. Pet. 10th Cir. Apndx. I at 80 and 212. As a result of the unauthorized leave, a three-week suspension without pay was imposed on Petitioner, from August 25 through September 12, 1997. Pet. 10th Cir. Apndx. I at 80, 212, and 248-251. At the meeting, Petitioner claimed for the first time that psychological, rather than physical, limitations prevented her from returning to work. Pet. 10th Cir. Apndx. I at 80 and 213. She was thus placed on administrative leave (with pay) on August 4, 1997 and sent for a fitness-for-duty evaluation by Dr. Gary Gutterman. Pet. 10th Cir. Apndx. I at 80, 159 and 213. Dr. Gutterman opined that Petitioner was capable of returning to full-duty work immediately and that her condition did not substantially limit any major life activities. Pet. 10th Cir. Apndx. I at 80-81, 159 and 213.

Petitioner eventually returned to work, but was frequently absent. She left at 10:45 a.m. on August 18 and never returned that day. Pet. 10th Cir. Apndx. I at 82 and 214. On August 19, she reported to work, but instructed that she was not seeing clients or accepting client telephone calls. Pet. 10th Cir. Apndx. I at 82, 165 and 214. On August 20, Sharon Trujillo, another City employee, complained in writing that she had encountered rudeness and abruptness when she called the OEA and Petitioner answered the phone. Pet. 10th Cir. Apndx. I at 82, 214 and 258. Also, on August 20, when Respondent Weimer attempted to meet with Petitioner to discuss her work since she returned to the OEA, she did not answer Respondent Weimer's questions and ultimately stood up and indicated that she had to leave for a doctor's appointment. Pet. 10th Cir. Apndx. I at 82, 167 and 214. She also indicated that she would not be returning to the office later in the day, even though her appointment was scheduled to last just one hour. Pet. 10th Cir. Apndx. I at 82, 167 and 214.

Another pre-disciplinary meeting was held on August 27, after which Respondent Weimer made the decision to terminate Petitioner. Pet. 10th Cir. Apndx. I at 83 and 214. As a result of inappropriate behavior, Petitioner was found to have violated at least eight work rules. Pet. 10th Cir. Apndx. I at 83, 215-216 and 263-266.

Petitioner was the first OEA social worker to have missed so much time from work. Pet. 10th Cir. Apndx. I at 85 and 167. After Respondent Weimer dismissed Petitioner, he hired another woman, Sue Carizzales, to fill Petitioner's vacated social worker position. Pet. 10th Cir. Apndx. I at 85 and 215. Petitioner subsequently filed another appeal with the Hearing Office of the Denver Career Service Authority. Pet. 10th Cir. Apndx. I at 85-86. Petitioner alleged discrimination and retaliation. Pet. 10th Cir. Apndx. I at 85-86. Petitioner did not attend the hearing because her mother was having knee surgery. Pet. 10th Cir. Apndx. I at 85-86. Because Petitioner did not appear, her claims were dismissed with prejudice by the Hearing Officer who found Petitioner's failure to appear unwarranted because of the minor nature of the relative's knee surgery. Pet. 10th Cir. Apndx. I at 85-86. Petitioner subsequently commenced the instant action alleging discrimination in violation of Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), §§ 1981 and 1983, and the Equal Pay Act. (EPA).

B. Proceedings Below

Pursuant to Supreme Court Rules 15(3) and 24(2), the Respondents are dissatisfied with the Petitioner's summary of the proceedings below. In particular, Petitioner has failed to point out that she limited the scope of her appeal to the Tenth Circuit when she asserted that the sole issue was "whether in granting summary judgment for the defendants the district court erred in holding that [petitioner] failed to make a sufficient showing that the defendants' articulated nondiscriminatory reasons for their adverse employment actions were, in fact, not their true reasons and were, indeed, pretextual." Pet. 4a-5a.

The Tenth Circuit also found that Petitioner waived issues that she raised for the first time in oral argument and other issues that were not adequately briefed. Pet. 5a. Thus, the Tenth Circuit considered on appeal only those claims that were dismissed by the District Court on the issue of pretext. Consequently, Petitioner has waived her right to seek certiorari review for those claims that were dismissed on other grounds, most notably that she failed to establish a prima facie case for certain claims on summary judgment. The claims include those premised upon the "exclusion from the information loop," "unwarranted criticism," performance reviews, a suspension, the "handling of disability insurance claims," disability discrimination under the ADA, retaliation, and a hostile work environment. In this proceeding, Petitioner also has abandoned her "handling of disability insurance" claims and hostile work environment claims as she does not address them in her petition.

REASONS FOR DENYING THE WRIT

A. PETITIONER FAILS TO CITE ANY COMPELLING REASONS THAT WOULD JUSTIFY THE COURT GRANTING CERTIORARI.

Petitioner's lawsuit alleges claims against the City and County of Denver under the Equal Pay Act, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act ("ADEA"), and the Americans with Disabilities Act of 1990 ("ADA"). Her lawsuit also includes claims against Respondents Wallach and Weimer in their individual capacities under 42 U.S.C. § 1981, for race discrimination and retaliation. Despite her shotgun approach in pleading claims, no admissible evidence surfaced in the summary judgment briefing that supported any of her claims. Petitioner did not present any issue of material fact on the essential elements of her claims, and summary judgment was properly affirmed by the Tenth Circuit. In her petition, Petitioner makes no meaningful argument as to why the Tenth Circuit should be reversed, let alone why this Court should grant her petition under Supreme Court Rule 10.

The Petitioner has not raised any compelling reasons that would justify the grant of certiorari. The Petitioner has not presented any issue involving a conflict among circuits. Nor has the Petitioner cited any unsettled questions of federal law or conflict with Supreme Court precedent. Instead, the Petitioner raises new issues that were not considered by the Tenth Circuit or inconsequential issues involving an interpretation of facts presented in the record reviewed in granting the Respondents' motion for summary judgment.

As stated above, the Tenth Circuit found that the Petitioner limited the scope of her appeal and waived issues that she raised for the first time in oral argument and through inadequate briefing. In particular, Plaintiff has waived all arguments regarding the determination that she failed to satisfy each element in support of the *prima facie* case for certain discrimination claims. Under these circumstances, the Supreme Court should not grant certiorari for review of issues that were not raised in the Tenth Circuit proceedings. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.13, *reh'g denied*, 425 U.S. 986 (1976). Petitioner does not make any argument that she did not limit or otherwise waive issues for consideration by the Tenth Circuit.

As to the issues that were not limited or otherwise waived, certiorari is still not appropriate for the additional reason that the petition is primarily a challenge regarding the lower courts' interpretation of the facts presented in the record supporting the grant of summary judgment. The Supreme Court, however, ordinarily does not grant certiorari regarding a conflict regarding the interpretation of facts. *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951) ("This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way.")

The only issue considered by the Tenth Circuit was whether summary judgment was appropriate when the petitioner was

unable to establish pretext as required by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); and *Reeves v. Sanderson Plumbing Prods. Inc.*, 120 S. Ct. 2097 (2000).[2] The Tenth Circuit correctly followed Supreme Court precedent regarding analysis of "pretext" in discrimination claims. In short, the Tenth Circuit correctly applied the law consistent with precedent from the Supreme Court, and there is no compelling reason that would warrant the petition for certiorari being granted. Because of the "melting pot" method of pleading claims presented in Petitioner's complaint, the Respondents will address each claim individually on the issue of pretext. Also, because the Petitioner raises issues in the petition that were limited or otherwise waived at the Tenth Circuit level, Respondents feel compelled to address those previously abandoned or waived issues as well.

B. PETITIONER'S CLAIMS BASED ON NATIONAL ORIGIN, RACE, AGE, AND SEX WERE PROPERLY DISMISSED.

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The moving party need not affirmatively negate the nonmovant's claim in order to obtain summary judgment. *Celotex*, 477 U.S. at 322-23. Instead, the movant only bears the initial burden of " 'showing'— that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. In this case, the Tenth Circuit found that Petitioner was unable to come forward with admissible facts to demonstrate that the Respondents' legitimate, nondiscriminatory reasons were pretextual.

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2. The Tenth Circuit's decision in the instant action is consistent with *Reeves* even though *Reeves* was decided after the Tenth Circuit decision.

The burden-shifting framework set forth in *McDonnell Douglas* applies to her claims based on seven alleged "adverse actions" under Title VII for race (Native American), national origin (Hispanic), and sex discrimination, § 1981 for race discrimination, and the ADEA for age discrimination. *McDonnell Douglas* requires that Petitioner demonstrate the *prima facie* elements of her claim. The Respondents must then show legitimate, non-discriminatory reasons for their action, at which time Petitioner then has the burden to produce "evidence upon which a fact finder could conclude that the defendant's alleged nondiscriminatory reasons for the employment decision[ ] are pretextual." *Ingels v. Thiokol Corp.*, 42 F.3d 616, 622 (10th Cir. 1994). "Failure to come forward with evidence of pretext will entitle the defendant to judgment." *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 529 (10th Cir. 1994). Each of the alleged "adverse actions" is addressed in turn below:

1. The return from promotional probation claim must fail.

The Tenth Circuit correctly found that the Petitioner failed to show that the legitimate, nondiscriminatory reasons profferred by the Respondents were a pretext for discrimination. There are several legitimate, nondiscriminatory reasons as to why Petitioner was returned from promotional probation: she was late or altogether failed in providing budget documents and job descriptions to Respondent Wallach; she attempted to pay a temporary worker $25 an hour although the position was a clerical position and Wallach had previously advised her to hire somebody at $10 to $11 hour for the clerical position; she attempted to have Foote supervise her rather than Respondent Wallach; she failed to ensure that leave accrual and leave deductions were properly recorded for OEA employees; and her failure to manage the petty cash account reflected poorly on her skills to manage the OEA.

In her summary judgment response, Petitioner did not rebut that she failed to maintain adequate leave records for leave time

used and accrued during the time that she was the OEA director; her argument that she inherited deficient leave records does excuse her from her own performance deficiencies in not maintaining adequate records for the time period she held the directorship. She also admitted that she was late with producing budget records.

Petitioner failed to establish that the City's legitimate, nondiscriminatory reasons are a pretext. The test here is good faith, meaning whether Respondent Wallach sincerely believed in the reasons supporting his decision to return Petitioner from promotional probation. In *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125 (10th Cir. 1998), the Tenth Circuit dismissed an ADEA case on the question of pretext where an employee had "not shown that at the time of his termination there was any dispute or a genuine issue concerning the *sincerity* of defendants' proffered reason for his termination." (Emphasis Added.) In *McKnight*, the employer proffered the legitimate, nondiscriminatory reason that it believed in good faith that the employee had sexually assaulted a female security guard, and the employee could not show that the belief was insincere. The Tenth Circuit also explained, "an articulated motivating reason is not converted into pretext merely because, with the benefit of hindsight, it turned out to be poor business judgment. *The test is good faith belief.*" (Emphasis Added.) 149 F.3d at 1129.

Petitioner cannot establish that Respondent Wallach did not in good faith believe that she was late in her tendering budget documents when she openly admits that she was late. Nor can she assert that Respondent Wallach did not sincerely believe that she attempted to hire a clerical worker at $25 an hour when she openly admits that she "took action" to hire a clerical worker without Respondent Wallach's approval, and the contract for hiring the temporary clerical worker stated the worker would be paid $25 an hour, even though it later turned out to be, according to her story, a typographical error. Nor can Petitioner assert that Respondent Wallach did not sincerely believe that

she had deficient leave records for the time period she supervised the OEA when an audit showed that her leave records were deficient or non-existent for the time period that she was the OEA Director. Respondent Wallach sincerely believed in the legitimate, nondiscriminatory reasons justifying her return from promotional probation. Petitioner presented no evidence to the contrary. An employee's "mere conjecture that [her] employer's explanation is a pretext for intentional discrimination is an insufficient basis for denial of summary judgment." *Branson v. Price River Coal Co.*, 853 F.2d 768, 772 (10th Cir. 1988). Petitioner's conclusory statements or unsupported assertions are inadequate to overcome summary judgment. *Martin v. Nannie and the Newborns, Inc.*, 3 F.3d 1410, 1417-18 (10th Cir. 1993).

2. The reassignment of duties claim must fail.

The Tenth Circuit properly determined that Petitioner did not establish that the Respondent's legitimate, nondiscriminatory reasons for the reassignment of duties were a pretext. Respondent Weimer exercised his business judgment in assigning particular job duties in the department. Schefe was assigned the task of working with drug and alcohol-related issues because Respondent Weimer wanted just one person to handle this area within the office, and chose Schefe who holds a Master's Degree in Social Work and has experience in the field of drug and alcohol counseling. Respondent Weimer assigned the job duties pertaining to workplace violence to himself because he wanted to send a message to other city departments that the OEA takes workplace violence issues so seriously that its director personally handles the training in that area.

Even if Petitioner were the best-qualified person with respect to these tasks, as she asserts, the failure to assign them to her is not, *a fortiori*, evidence of pretext. An employer cannot assign *all tasks* to the one employee in the office who thinks he or she is the most qualified. No work would ever be performed by the remainder of the employees if that were true.

3. The "exclusion from loop of information" and "unwarranted criticism" claim must fail.

The district court concluded that "exclusion from the loop of information" and "unwarranted criticism," even if true, did not rise to the level of adverse employment actions. Thus, the district court concluded that Petitioner failed to satisfy the elements for the *prima facie* case. Because the Petitioner waived before the Tenth Circuit her arguments regarding the "prima facie" issues in this case, the Supreme Court should not consider these claims.

In any event, the district court properly determined that "exclusion from the loop" and "unwarranted criticism" are not adverse employment actions. *Sanchez v. Denver Public Schools*, 164 F.3d 527, 532-33 (10th Cir. 1998) (" 'unsubstantiated oral reprimands' and 'unnecessary derogatory comments' such as those alleged here are not included within the definition of adverse action absent evidence that they had some impact on the employee's employment status"). Petitioner failed to rebut this argument with admissible evidence as required under *Celotex*, 477 U.S. at 317. Moreover, Petitioner failed to provide any evidence relating to a specific instance where she was not advised about something she should have been advised about and where others outside the protected group(s) were not excluded from the loop of information. Thus, whether information was provided to her or not is immaterial unless it can be shown that the dissemination of information was done on a discriminatory basis in favor of employees outside of the protected group. Her argument that Respondent Weimer did not have weekly staff meetings undermines a disparate treatment claim because she, in essence, is admitting that the alleged lack of communication was directed to all employees.

With respect to the criticism lodged by Respondent Weimer, he had a legitimate, nondiscriminatory reason — he believed Petitioner was attempting to thwart him as supervisor in providing an unsolicited opinion with respect to a clinical issue. However, whether the criticism is justified or not is immaterial.

"Title VII does not compel every employer to have a good reason for its deeds; it is not a civil service statute." *EEOC v. Flasher, Inc.*, 986 F.2d 1312, 1321 (10th Cir. 1992). Petitioner did not establish that Respondent Weimer did not sincerely believe that Petitioner was attempting to thwart him by providing an unsolicited opinion of great magnitude, nor did she contest that her unsolicited opinion was of a great magnitude. Thus, Petitioner failed to carry her burden in establishing pretext.

4. The performance review claim must fail.

The district court concluded that Petitioner failed to offer evidence satisfying the *prima facie* elements of this claim. The Supreme Court should not grant certiorari review on this issue because the Tenth Circuit did not address this issue as a result of Petitioner's waiver of issues — limiting the scope of the Tenth Circuit appeal to issues involving only pretext.

In an abundance of caution, the Respondents offer the following argument should the Supreme Court wish to consider the performance review claims. The district court concluded that a "meets expectations" rating on her 1996 performance review was not an adverse action. The district court further concluded that she had not demonstrated that "glowing appraisals were given to younger, non-minority, or male employees who performed comparable work."

It is absurd for Petitioner to contend that this rating was somehow discriminatory. She apparently believes that she should have been rated higher in her performance of social work duties. Respondent Weimer was solely responsible for rating Petitioner in this performance review, and determined from his observations during this time period, that her performance was average, and thus he provided to her a "meets expectations" rating. She offered no evidence that comparable employees outside the protected group(s) received higher ratings for the same level of performance displayed by Petitioner. Although she argued that her prior performance reviews had higher ratings, that fact is immaterial, because the "similarly situated" analysis

is directed to employees of the same supervisor. According to the Tenth Circuit, "[s]imilarly situated employees are those who with the same supervisor and are subject to the same standards governing performance evaluation and discipline." *Aramburu v. The Boeing Co.*, 112 F.3d 1398, 1403 (10th Cir. 1997). The September 20, 1996 performance review was the first one that Respondent Weimer performed for Petitioner. Moreover, prior performance reviews do not, by themselves, establish that a later performance review is a pretext for discrimination.

In any event, Petitioner failed to show that the City's legitimate, nondiscriminatory reason is a pretext. There is no evidence in the record that Respondent Weimer did not consider comments made about Petitioner from officials outside the OEA. He rated her performance according to his observations.

With respect to Petitioner's final performance review, she cannot allege that she was performing at a satisfactory level as she was absent from work so many days during this rating period (excluding the time she was on Family and Medical Leave). She did not establish that non-minority similarly situated employees were rated higher than she even though they had the same level of performance; she could not do this as she is the only clinical social worker to have missed so much work without adequate medical documentation. Nor did Petitioner show that the City's legitimate, nondiscriminatory reasons for the final review were a pretext. Finally, the City incorporates the arguments contained *infra* relating to medical documentation, suspension, and dismissal, which concern this rating period, and which demonstrate that Petitioner was not performing at a satisfactory level.

5. The harassment claim regarding medical documentation must fail.

The Tenth Circuit appropriately found that the Petitioner failed to establish that the proffered legitimate, nondiscriminatory reasons for requesting medical documentation were a pretext. Respondent Weimer was following the City's personnel rules which allow a supervisor

to investigate alleged illnesses and require adequate documentation attesting to an employee's inability to work. Petitioner offered no evidence of pretext.

Petitioner's argument is that Weimer was "being totally inflexible" because he did not contact her doctors directly and because one of the doctors called the form requesting additional information "ridiculous." It is unclear what sort of legal argument this is, but in any event, the "ridiculousness" of Respondent Weimer's actions is belied by the fact that Petitioner ultimately admitted in her deposition that there was *nothing* about her knee injury that prevented her from returning to her job, which was primarily a desk job. This is precisely what Respondent Weimer was seeking to determine from his requests for medical documentation, consistent with the City's personnel rules.

Moreover, notwithstanding Petitioner's displeasure with Respondent Weimer's repeated requests for information, such do not give rise to a claim of harassment under Title VII, § 1981, or the ADEA. Such statutes involve only race, national origin, sex, or age discrimination, not any alleged handicap or disability discrimination. *Aramburu*, 112 F.3d at 1411. *See also Duane v. Government Employees Ins. Co.*, 784 F. Supp. 1209, 1216 (D. Md. 1992) (noting § 1981 does not address handicap discrimination), *aff'd*, 37 F.3d 1036 (4th Cir. 1994), *cert. dismissed*, 515 U.S. 1101 (1995); *Duncan v. AT&T Communications, Inc.*, 668 F. Supp. 232, 235 (S.D.N.Y. 1987) (ruling that § 1981 does not address disability discrimination).

Petitioner leaves the Court and the Respondents guessing as she does not explain with respect to what protected status Respondent Weimer allegedly was harassing her. Indeed, if it is with respect to her alleged disabled status, the Americans With Disabilities Act allows an employer to request adequate medical documentation from an employee who requests leave, and to even order a physical examination with a physician of the employer's choosing. 42 U.S.C. § 12112(d)(4)(B) ("a covered entity may make inquiries into the ability of an employee to

perform job-related functions); *Rodriguez v. Loctite Puerto Rico, Inc.*, 967 F. Supp. 653 (D. Puerto Rico 1997).

Respondent Weimer had a legitimate, non-discriminatory reason for requesting additional medical documentation from Petitioner, given her extensive absence from work, when her purported reason for not returning to work was a knee injury, her job primarily was a desk job, and she never once explained why she could not return to work notwithstanding the knee injury. In response to her argument that Respondent Weimer should have contacted her physician by telephone, instead of the letter format chosen by Respondent Weimer, Petitioner cites no case law for this proposition, and does not explain how the communication by telephone would in any event be different than that by correspondence. Moreover, her physician's purported opinion that the correspondence from Respondent Weimer constituted "ridiculous forms" is not admissible evidence on summary judgment. It is an inadmissible opinion.

6. The suspension and termination claims must fail.

The Petitioner should not be allowed to challenge the suspension claim because the district court found that she failed to establish the *prima facie* case, and Petitioner was found to have waived this issue for appeal by the Tenth Circuit. In any event, Petitioner cannot establish this *prima facie* burden because she was unable to compare herself to similarly situated non-minority employees who had missed so much work and failed to provide adequate medical certifications for such long absences.

Even if Petitioner could establish the *prima facie* elements her suspension claim, there were legitimate, non-discriminatory reasons for the suspension which she does not refute or provide any evidence of pretext: she had unauthorized leave and refused to report to work. *See, e.g., Willis v. Conopco, Inc.*, 108 F.3d 282, 287 (11th Cir. 1997) ("[w]hen an employee refuses to show up for work after being informed that her failure to do so will result in the loss of her job, the employer has presented a valid, non-retaliatory reason for terminating the employee").

With respect to the termination, Petitioner concedes any gender discrimination claim because she was replaced with a female, but continues to advance this claim on the theory of discrimination based upon national origin, race, and age (notwithstanding the fact that she failed to produce evidence of her replacement's national origin, race, or age). The Tenth Circuit properly affirmed summary judgment on this claim because the Petitioner did not come forward with admissible evidence establishing that the legitimate, nondiscriminatory reasons were a pretext for discrimination. It is undisputed that Petitioner failed to produce adequate documentation requested by Respondent Weimer to substantiate Petitioner's request for further leave from work. It is also undisputed that Dr. Gary Gutterman, M.D., a psychiatrist, evaluated Petitioner, and determined she was fit to return to work immediately, and Petitioner was refusing to do so notwithstanding Dr. Gutterman's determination. Trujillo, a City employee, made a written complaint regarding her encountering rudeness and unprofessionalism from Petitioner when she telephoned the OEA. Petitioner was also hostile and belligerent toward Respondent Weimer in the final days of her employment. In her petition, Petitioner fails to address the Respondents' arguments regarding her rudeness and belligerence.

C. PETITIONER'S RETALIATION CLAIM WAS PROPERLY DISMISSED.

The Supreme Court should not grant certiorari review on the retaliation claim because the Tenth Circuit affirmed summary judgment of this claim on the issue of pretext and the Petitioner failed to address this pretext issue in her petition. Petitioner offers arguments regarding the *prima facie* burden, but as expressed above, those issues were waived by Petitioner before the Tenth Circuit with her limiting the scope of her appeal and inadequate briefing. In any event, Petitioner cannot satisfy the *prima facie* and pretext requirements for this claim.

The district court assumed Petitioner's retaliation claim was brought under Title VII, the ADEA, § 1981, and the ADA, based

on three purported protected activities: (1) filing grievances regarding breach of confidentiality allegations brought against her, her return from promotional probation and her termination; (2) complaining in March of 1994 that if she were a white male, she would be paid more money; and (3) the filing of a charge with the EEOC and the Colorado Civil Rights Commission in December 1995. The district court ultimately concluded that one of the grievances (regarding breach of confidentiality) was not a protected activity, one of the grievances (regarding the dismissal) was not followed with any adverse action, and the remaining grievance, complaint, and EEOC charge, were not close enough in time to any adverse action to support a retaliation claim.

With respect to the grievance regarding the breach of confidentiality, Petitioner did not allege discrimination and therefore it was not a protected activity. *Barber v. CSX Distrib. Serv.*, 68 F.3d 694 (3rd Cir. 1995) (complaints about unfair treatment in general not found to be complaint of discrimination). However, she claims she verbalized her complaint of discrimination to Respondent Wallach before filing the written grievance. Notwithstanding that she did not allege her verbal complaint to Respondent Wallach as a protected activity, she admits she unprofessionally yelled at Respondent Wallach in the conversation on July 14, 1995, to which she refers. Because Petitioner was so confrontational and hostile in yelling at Respondent Wallach that he discriminated against her, such communication is precluded from being viewed as a protected activity. *Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222 (1st Cir. 1976) (plaintiff's extreme hostility in complaining of discrimination not found to be protected activity under Title VII). It was also not objectively reasonable for Petitioner to believe she was being discriminated against. *Little v. United Tech., Career Transicold Div.*, 103 F.3d 956 (11th Cir. 1997) ("A plaintiff must not only show that he *subjectively* (that is, in good faith) believed that his employer was engaged in unlawful employment practices,

but also that his belief was *objectively* reasonable in light of the facts and record presented"). In fact, Petitioner states she felt discriminated against because the Mayor donated sick leave to a black employee, and Petitioner was asked to process the donated sick leave as quickly as possible. These facts, measured under an objective test, would not lead a non-black employee to reasonably conclude in good faith that he or she was a victim of race discrimination. Courts do not afford protected activity status where an employee does not have a good faith, articulable basis upon which to complain of discrimination.

With respect to the grievance regarding her return from promotional probation, Petitioner does not specify when this grievance was filed, but assuming it was at the time she was returned from promotional probation in August 1995, the next adverse employment action would have been in July 1997 when she was given notice of a three-week suspension. This is almost two years later. Under these circumstances, there is no causal connection as too much time passed between the alleged protected activity and the notice of suspension. *See Conner v. Schnuck Markets, Inc.*, 121 F.3d 1390, 1395 (10th Cir. 1997) (four-month time lag between participation in protected activity and termination not sufficient to justify inference of causation); *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997) (finding three months insufficient).

With respect to the complaint about an alleged disparity in pay in March of 1994, even if true, which the City strongly contests, Petitioner cannot establish a causal connection to any adverse employment action. Petitioner states that the first adverse employment action was her extension of promotional probation on July 19, 1995. An extension of promotional probation is not an adverse employment action. In any event, too much time elapsed from the alleged protected activity and the probation extension for there to be an inference of a causal connection.

Finally, with respect to the charge of discrimination filed in December of 1995, there is no evidence in the record that

Respondent Weimer knew at that time that the charge was filed. To the contrary, he was not aware of it. While it is true that the filing of a charge of discrimination with the EEOC is viewed as a protected activity, there is no causal connection if the alleged perpetrator committing retaliation does not even know of the EEOC charge being filed.[3] *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653 (4th Cir.1998). Moreover, assuming the EEOC charge was filed on December 7, 1995, the next adverse employment action would be the notice of suspension in July 1997. Again, this is almost 1 ½ years later. Under these circumstances, there is no causal connection.

Moreover, there are legitimate, non-retaliatory reasons for each and every adverse action Petitioner contends is retaliatory. The Respondents incorporates by reference preceding arguments regarding the legitimate nondiscriminatory reasons. As stated before, there is no evidence in the record that the explanations for the adverse employment actions are a pretext.

D. PETITIONER'S DISABILITY DISCRIMINATION CLAIM WAS PROPERLY DISMISSED.

The Supreme Court should not grant certiorari review of the disability discrimination claim because it was dismissed by the district court for her failure to satisfy the *prima facie* case and because she limited the scope of her appeal and waived that issue in the proceedings before the Tenth Circuit. Moreover, Petitioner's arguments are meritless.

The district court concluded that Petitioner did not establish a *prima facie* case of disability discrimination because she did not establish that she is disabled as she offered no affidavits from medical experts indicating that her alleged depression substantially limited any major life activities and the physician

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3. Petitioner makes much ado about Weimer having approved time off for Petitioner and her witnesses to attend a Career Service hearing. However, that does not establish that Weimer knew what the hearing was about. Petitioner's conjecture and speculation were not sufficient to defeat summary judgment.

statements she offered regarding depression and situational anxiety disorder constitute inadmissible hearsay. The district court further concluded that she produced no evidence that she was terminated because of her alleged disability. To the contrary, the court noted that the City believed, based on the affidavit of Dr. Gutterman, who indicated that Petitioner was fit for duty, was not disabled. Petitioner argues that she was disabled pursuant to the inadmissible hearsay statements from her physicians, and that she had discussed the possibility of a transfer as a reasonable accommodation with Dr. Gutterman.

Petitioner has offered no meaningful argument to refute the district court's conclusion. With respect to the first element of an ADA claim under *White v. York Intern. Corp.*, 45 F.3d 357, 360-61 (10th Cir. 1995), that an employee is disabled, approximately one month before her termination for employment, Petitioner was examined by Dr. Gary Gutterman, M.D., a psychiatrist, who diagnosed Petitioner with a mild depression. Dr. Gutterman also opined that, at the time of his examination of Petitioner, she did not have a physical or mental impairment substantially limiting one or more major life activities. In fact, he said that she was fit to return to work immediately at that time without any restrictions.

Petitioner's allegations of depression and situational anxiety disorder did not defeat summary judgment for several reasons.[4] First, the ADA requires an individualized inquiry, and there cannot be any automatic determinations that a certain mental condition, including depression or situational anxiety disorder, qualifies as a disability within the meaning of the ADA. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999). Indeed, "just because the plaintiff has been diagnosed with an impairment it does not follow that she is disabled under the

4. It should also be noted that Petitioner claims that she was totally disabled as of August 1, 1997. Pet. 10th Cir. App. I at 130-34. If Petitioner's allegation is taken as true, then she is not a qualified individual with a disability because she cannot perform any job whatsoever. Petitioner is speaking out both sides of her mouth.

ADA. She must still prove that she is substantially limited in her major life activities." *Sorenson v. University of Utah Hosp.*, 1 F. Supp.2d 1306, 1309 (D. Utah 1998), *aff'd*, 194 F.3d 1084 (10th Cir. 1999). *See also*, 29 C.F.R. pt. 1630 app., § 1630.2(j) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual").

Moreover, as Petitioner did not produce affidavits from any experts on the issue whether she has a physical or mental impairment substantially limiting one or major life activities, and because her alleged disability is not so obvious, she cannot rely on her own testimony to establish she has a disability within the meaning of the ADA. Expert testimony is generally required for an ADA litigant to prove his or her prima facie case unless the disability is patently obvious. While there may be rare circumstances where the disability is obvious (*e.g.*. the loss of an arm), such is not case here. *Katz v. City Metal Co.*, 87 F.3d 26, 31 n.4 (1st Cir. 1996) ("[Where it is not obvious to a lay jury that the condition affects one of the bodily systems listed in the regulations, expert testimony that it does may well be necessary to avoid judgment as a matter of law"). Because Petitioner's alleged disability is not obvious, and Petitioner did not disclose any medical experts, she could not prove this critical element of her ADA claim.

The statements made by Petitioner's treating physicians to Respondent Weimer are hearsay, and thus not admissible for proving the truth of the matter asserted. Moreover, such statements did not address the issue whether she has a physical or mental impairment substantially limiting on or more major life activities.

Even assuming *arguendo* that Petitioner's mental condition limited her ability to work, that does not mean that her major life activity of working had been substantially limited. Her inability to work one job does not mean that her major life activity of working has been substantially limited. 29 C.F.R.

§ 1630.2(j)(3)(i). Petitioner apparently is misusing this term. With respect to the major life activity of working, the term "substantially limits" means "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities." 29 C.F.R. § 1630.2(j)(3)(i). Specific factors to be taken into consideration in this analysis are set forth in 29 C.F.R. § 1630.2(j)(3)(ii).

Petitioner offered no evidence in support of any of these mandatory factors. Thus, she had not established that her major life activity of working has been substantially limited. Moreover, Petitioner admits that she has never consulted or obtained any reports from any vocational expert to address these factors. The Tenth Circuit affirmed summary judgment where an employee suing for disability discrimination failed to present vocational expert testimony to establish that the employee's medical condition substantially limited her major life activity of working. *Welsh v. City of Tulsa*, 977 F.2d 1415 (10th Cir. 1992).

Nor did Petitioner prove the second element of the ADA prima facie case, that is, show that she is a qualified individual with a disability. This involves a two-part analysis: (1) first, whether the individual could perform the essential functions of the job, *i.e.*, functions that bear more than a marginal relationship to the job at issue; and (2) second, if it is concluded that the individual is not able to perform the essential functions of the job, there must be a determination whether any reasonable accommodation by the employer would enable the employee to perform those functions. *White*, 45 F.3d at 361-62. Petitioner is not "qualified" as she refused to come to work. "Obviously, an employee who does not come to work cannot perform the essential functions of [her] job." *Nowak v. St. Rita High School*, 142 F.3d 999 (7th Cir. 1998), citing *Tyndall v. National Educ. Ctrs., Inc.*, 31 F.3d 209, 213 (4th Cir. 1994).

With respect to the issue of reassignment, Petitioner did not allege in her complaint that she should have been reassigned to another position on a temporary basis, or that she has been denied any reasonable accommodation. To the extent that Petitioner now alleges she should have been reassigned to another position, she does not cite one vacant position that she *could* have been reassigned to. She therefore cannot show that reassignment was even possible as a reasonable accommodation; she cannot sit back and rely on her opinions, speculation, and cursory statements in an attempt to avoid summary judgment. *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1125 (10th Cir. 1995) (plaintiff's speculation that he probably could have transferred to another job without identifying a specific position was insufficient to survive summary judgment); *White*, 45 F.3d at 357 (employee's conclusory allegations that the employer could accommodate him were insufficient to survive summary judgment); *Carrozza v. Howard County, M.D.*, 847 F. Supp. 365, 368 (D. Md. 1994), *aff'd*, 45 F.3d 425 (4th Cir. 1995) (summary judgment granted because the plaintiff's claim that she could perform the job with reasonable accommodation amounted to "conclusory observations" and "personal conjecturing"). Respondent Weimer said in his affidavit that there were no positions available, and Petitioner failed to rebut this fact.

Petitioner could not prove the third element of the *prima facie* case under *White*, that the employer terminated the employee because of his or her disability. If the employee cannot show, to satisfy the third element, that he or she was terminated as a result of a disability, then summary judgment is proper. *MacDonald v. Delta Airlines, Inc*, 94 F.3d 1437, 1446 (10th Cir. 1997). There is no evidence in the record that Petitioner was terminated as a result of a disability. To the contrary, Petitioner was terminated because she failed to come to work and failed to provide adequate medical certifications justifying the same. The City believed Petitioner was capable of working without restrictions, and thus it cannot be said that

the City dismissed Petitioner because of a disability. The City also incorporates by reference prior discussions of its legitimate, nondiscriminatory reasons for Petitioner's dismissal.

E. PETITIONER'S COMPENSATION DISCRIMINATION CLAIMS UNDER TITLE VII AND THE EQUAL PAY ACT WERE PROPERLY DISMISSED.

The Tenth Circuit properly affirmed summary judgment of the compensation claims.

The City had a legitimate reason pursuant to the City's personnel rules for Respondent Weimer being paid more than Petitioner: Petitioner obtained the Director's position as a promotion and as such was to be compensated within the "A" to "C" step range; Respondent Weimer transferred into the position and his salary remained the same as it had been before. The court found that Petitioner had produced no evidence of pretext.

Petitioner argues that $55,000 was budgeted for the Director's position and therefore she should have received such amount. Moreover, she argues that Respondent Weimer was not qualified for the position. Petitioner's arguments are without merit and should be summarily rejected. Moreover, the fact that Respondent Weimer received a higher salary is also irrelevant to the analysis as he was not similarly situated to Respondent. He transferred into the position as a director from a different agency, and kept his same salary. Petitioner's contention that Respondent Weimer was less qualified than she is nothing but inadmissible opinion testimony. Petitioner has not explained how this is so, and her argument is contrary to the undisputed fact that Respondent Weimer, unlike Petitioner, was already a director when he transferred to the OEA as its director.

Further, Petitioner's EPA claim is time-barred. The statute of limitations for EPA claims is two years. 29 U.S.C. § 255(a). Petitioner's position as OEA director ended in August 1995. Her complaint was filed December 19, 1997, more than two years later. Petitioner did not establish a willful violation (which

has a three-year statute of limitations) because it is undisputed that it is the City's practice to pay new hires or individuals being promoted between the "A" and "C" steps, and that Respondent Weimer was paid more because he kept his directorship salary when he transferred to the OEA.

F. THE INDIVIDUAL DEFENSES ASSERTED BY RESPONDENTS WALLACH AND WEIMER BAR THE SECTION 1981 CLAIM.

Although not considered by the Tenth Circuit and the district court, individual defenses asserted by Respondents Wallach and Weimer were addressed by the Petitioner in her petition for writ of certiorari. Should the Court wish to address these issues, the Respondents submit the following argument for each individual defense.

The parties agree that in Colorado the statute of limitations for this claim is two years, that the continuing violation doctrine does not apply, and that all conduct prior to December 19, 1995 is time barred. Respondent Wallach asserted this defense because he had no further involvement with the Petitioner after he returned her from promotional probation in August 1995. Petitioner offered inadmissible conjecture to suggest he had some involvement, but that is not sufficient to withstand a motion for summary judgment, particularly under summary judgment standards where individual defendants assert qualified immunity.

Turning to qualified immunity, Respondents Wallach and Weimer assert this defense because it is not clearly established that their conduct violated § 1981 – which prohibits only racial discrimination and retaliation. The doctrine of qualified immunity allows courts to expeditiously weed out suits against government officials which fail to establish a violation of a clearly established right prior to imposing the burdens of discovery and litigation. *Siegert v. Gilley,* 500 U.S. 226, 232 (1991); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Looking at only conduct occurring within the relevant two-year time

period, there are no admissible facts that would give rise to a cognizable claim under § 1981.

While the City may not avail itself of the issue preclusion defense enunciated in *University of Tennessee v. Elliot*, 478 U.S. 788 (1986), such a defense is available to the individual defendants as they are being sued under § 1981 — a Reconstruction Era Claim. As mentioned above, Petitioner filed unsuccessful appeals with a Hearing Officer of the Denver Career Service Authority alleging racial discrimination and retaliation. Under these circumstances, the Petitioner should not be allowed to relitigate her Reconstruction Era claim.

CONCLUSION

Based on the foregoing, the Respondents respectfully request the Court to deny the petition for writ of certiorari. There are no compelling reasons that meet the standards of Supreme Court Rule 10. Moreover, the Tenth Circuit properly affirmed summary judgment.

Respectfully submitted,

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